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IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,318

THE STATE OF FLORIDA,

Petitioner,

vs.

STEVEN K. HOLIDAY,

Respondent.

ON PETITION FOR DISCRETIONARY REVIEW

REPLY BRIEF OF PETITIONER ON THE MERITS

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ARGUMENT

THE PROCEDURES OUTLINED AND UTILIZED BY THE LOWER COURT FOR REVIEWING NEIL ISSUES ON APPEAL ARE INCONSISTENT WITH THE PRONOUNCEMENTS OF THIS COURT.

The Respondent's Brief initially defines the issue before this Court as "whether a party has the right to require an opposing party to give race neutral reasons for a peremptory challenge despite the fact that there is nothing in the record which would create even an inference that the opposing party was discriminating in jury selection." Brief of Respondent, p. 5. While the State would concur that one issue herein is clearly whether a prima facie case, however defined, must be established prior to any Neil inquiry by the trial judge, the State would further note that the issues before this Court go considerably further, as the Court must also decide what consequences, if any, attach to a wrongful decision of a trial judge to conduct a Neil inquiry.

Furthermore, the instant case presents this Court with the opportunity to decide not only whether the Third District Court of Appeal has properly construed the role of trial judges in light of this Court's decisions; but, this Court has the further opportunity to decide whether the procedures to be followed by trial courts and appellate courts, in the future, should be altered.

The principal question presented in this proceeding is whether State v. Johans,

613 So. 2d 1319 (Fla. 1993), in eliminating the requirement that a "substantial likelihood" of discrimination be established as a prerequisite for a Neil inquiry, still required that a reasonable inference of discrimination be established prior to any inquiry by the trial judge. The essence of the Respondent's argument on this issue appears to be that the "reasonable inference" test applied by the Third District is one which should be deemed valid for various policy reasons. See, Brief of Respondent, pp. 8-15. That, however, is not the proper question. The real question, as far as the instant case is concerned, is what Johans held. While Johans held that the substantial likelihood requirement no longer existed, nowhere did the Johans opinion assert that any lesser prima facie case requirement - be it the "reasonable inference" test or any other test - still existed. Thus, as emphasized in Valentine v. State, 616 So. 2d 971, 974 (Fla. 1993), "once a party makes a timely objection and demonstrates on the record that the challenged persons are members of a distinct racial group, the trial court must conduct a routine inquiry." Similarly, in Windom v. State, 656 So. 2d 432, 437 (Fla. 1995), another post-Johans case, this Court stated that Johans

> requir[ed] a Neil inquiry when an objection is raised that a peremptory challenge is being used in a racially discriminatory manner. However, a timely objection and a demonstration on the record that the challenged person is a member of a distinct racial group have consistently been held to be necessary.

In neither Johans nor any of the post-Johans decisions did this Court refer to any prima facie case requirement; the only prerequisites to the inquiry were an objection and a demonstration that the challenged person belonged to a distinct racial group or

gender.

In view of the foregoing, the most significant question is how any trial judge could conceivably be faulted for reading Johans as having eliminated the prima facie case requirement. How could any trial judge have been expected to read Johans as requiring that a party objecting to a peremptory challenge first establish a reasonable inference of discrimination before the inquiry? If a trial judge could not reasonably be expected to read Johans as containing a "reasonable inference" test, when no such test is referred to therein, how can trial court judges be deemed at fault, by virtue of reversals of convictions, as a result of their failures to apply the reasonable inference test which is nowhere to be found in either Johans or any of this Court's post-Johans decisions? Thus, the Respondent's argument that a "reasonable inference" test is either desirable or reasonable is one which begs the question. The initial question is simply whether trial judges were properly following the dictates of Johans and how they can be faulted for failing to interpret Johans as requiring something to which Johans does not even refer.

The Respondent has further argued that the "reasonable inference" test is one which should be easy for trial judges to apply. The State would first note that that is an argument which should go solely to any prospective trials, as, for the reasons noted above, that requirement does not flow from Johans. Secondly, the Respondent's argument regarding the easy-to-apply nature of the "reasonable inference" test fails

to address the arguments presented in the State's Initial Brief of Petitioner herein. In all of the pertinent case law, the phrases "reasonable inference" and "substantial likelihood" have been used interchangeably, as one and the same. That compels the conclusion that there is no difference between the two tests. If there is no difference between the two tests, there is no reason to believe that a "reasonable inference" test would be easier for trial judges to apply than a "substantial likelihood" test. That is simply a further indication of the reason why trial court judges correctly construed this Court's opinion in Johans as not requiring any such test.

The Respondent urges this Court to place great weight on the Court's prior holding in Reed v. State, 560 So.2 d 203, 206 (Fla. 1990), with respect to the great deference which should be accorded to trial court judges "who are on the scene and who themselves get a 'feel' for what is going on in the jury selection." See, Brief of Respondent, pp. 8-10. The State concurs that the precept enunciated therein is of the utmost significance. Indeed, its applicability should compel appellate courts to place great weight on, and to generally defer to, the decisions of trial judges as to requiring attorneys to give race- or gender-neutral reasons for peremptory challenges. The Respondent errs, however, in urging that "the same logic applies when reviewing cases from the district courts of appeals." Brief of Respondent, p. 10. District Court of Appeal judges were not present during voir dire. Unlike the trial court judges, the appellate court judges did not see the demeanor of venire members; they did not hear the manner in which responses were asserted. Appellate court judges do not get a

"feel" for anything other than what is written in black and white in the trial transcripts. This Court, in its review capacity, is obviously just as capable of reviewing the same black-and-white transcripts as the District Court of Appeal judges. Thus, the logic or Reed works only in one direction - i.e., deference to trial court judges. The lesson from Reed therefore is that the Third District Court of Appeal should be according a higher level of deference to the decisions of trial court judges who initiate Neil inquiries.

The State, in its prior brief herein, asserted that the Third District Court of Appeal's line of cases effectively holds that a trial court lacks jurisdiction to conduct a Neil inquiry absent a demonstration of the requisite "reasonable inference" prima facie case. The Brief of Respondent appears to take issue with that characterization of the Third District's line of cases leading up to the instant decision. See, Brief of Respondent, pp. 19-23. Thus, the Respondent argues that reversals in the Third District Court of Appeal have not been based on "technically insufficient [Neil] objections," but instead, have been based on the absence of evidence of discrimination in the record. Brief of Respondent, pp. 22-23. That, however, is not a fair reading of the Third District's cases. For example, in Pride v. State, 664 So. 2d 1114, 1115 (Fla. 3d DCA 1995), the court, in evaluating the Neil inquiry which the trial court conducted pursuant to an objection which the Third District deemed insufficient, stated:

> However, the trial court relied on appellant's

> justifications in determining failure to give a race-neutral reason for challenging the prospective juror. In doing so, the trial court entertained reasons and justifications which should not be probed, absent a proper objection. *See Garcia*, 655 So. 2d at 195. The fact that the trial court ultimately found the justifications discriminatory is immaterial where the threshold requirements of a *Neil* inquiry were not met. In essence, its finding was based upon waters best left uncharted.

(emphasis added). The Third District has made it clear that anything transpiring in a Neil inquiry commenced pursuant to an insufficient objection is irrelevant and cannot be considered by the Court. Following the Third District's express reasoning in Pride, if, after an insufficient objection due to the lack of a reasonable inference of discrimination, the trial court conducts an inquiry, and the defense attorney volunteers that the juror was stricken because the attorney does not believe that jurors of that race would make good jurors, the Third District's line of cases would mandate the conclusion that that reason could not be considered and that the court would have to abide by an admittedly discriminatory peremptory challenge.

The Third District resorted to the same reasoning in the instant case. The prosecutor initially objected, asking "for race and gender reason." During the course of the ensuing Neil inquiry, the prosecutor, after hearing defense counsel's reasons for the challenge, asserted that the defense had used all five of its peremptory challenges on white members of the jury. (T. 165-66). In the Initial Brief of Petitioner, the State had asserted that the Third District had "cavalierly" treated the facts of the instant case by ignoring the prosecutor's observation that all five of the defense peremptory

challenges were utilized on white panel members. Initial Brief of Petitioner, pp. 46-47. The Respondent has asserted that the State, in quoting footnote one of the lower Court's opinion in this case, ignored the concluding sentence of that footnote. However, the footnote, in its entirety, demonstrates the State's point: anything which transpires subsequent to what the Third District concludes is an insufficient objection is irrelevant, and cannot be considered, because the trial court's inquiry is then one for which jurisdiction is lacking. Thus, after the lower Court observes that "the state's bare request for race and gender neutral reasons was not enough to warrant the trial court's inquiry," slip op. at p. 5; App. 5, the Court added this footnote:

> In fact, the State's objection failed to demonstrate on the record whether juror Urrutia was a member of a distinct racial group or cognizable class. However, because the stated objection did identify her as to her gender, we analyze the sufficiency of the State's objection under the third prong of the previously mentioned test.

Id. at pp. 5-6, n. 1. Even though the State, during the course of the post-objection Neil inquiry, asserted that the stricken juror was white and that the defense had used all five of its peremptory challenges on white panel members, the Third District did not view the identification of the jurors as white as having been made; the Third District did not give any credence to the alleged pattern of discriminatory challenges - i.e., a series of five consecutive challenges all utilized on white panel members.[1] In short,

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[1] This is the type of pattern of challenges which, even in the pre-Johans days, would have sufficed to warrant a Neil inquiry, as it would have satisfied the "substantial likelihood" test. See, e.g., Bryant v. State, 565 So. 2d 1298 (Fla. 1990) (defense satisfied burden under Neil where five of first seven peremptory challenges were used

even though the prosecutor, subsequent to the objection which the lower Court deemed insufficient, clearly alleged a pattern of discriminatory peremptory challenges, such factual allegations could not be considered by the lower Court because they were made during the course of an inquiry for which the lower Court believes jurisdiction to have been lacking. That is what the State is referring to when the State, in its prior brief, questioned the function served by a hypertechnical ruling. Brief of Petitioner, p. 47. The Third District, in the instant case, has most clearly indicated that allegations of a prima facie case, even when they are made and even when they do satisfy the Third District's "reasonable inference" test, are utterly irrelevant once an inquiry has commenced pursuant to a technically deficient objection.

The foregoing point is further demonstrated by the opinion in United States v. Koon, 34 F. 3d 1416, 1440-41 (9th Cir. 1994), rhg. denied, 45 F. 3d 1303 (1995), affirmed in part, reversed in part (on other grounds), ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed. 2d ___, 9 Fla. L. Weekly Fed. S698 (June 13, 1996). Relying on Koon in the Initial Brief of Petitioner herein, the State used it to demonstrate that even if a prima facie case requirement exists, reasons which are volunteered by a defense attorney, pursuant to a prosecutor's objection and a judge's inquiry, can nevertheless be considered when they are given by the attorney, in response to the judge's inquiry.

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by prosecution against black prospective jurors); J.H.C. v. State, 642 So. 2d 601 (Fla. 2d DCA 1994) (striking of several males deemed sufficient showing under Neil); McKinnon v. State, 547 So. 2d 1254 (Fla. 4th DCA 1989) (striking of two black jurors treated as establishing a pattern requiring inquiry).

The Respondent interprets Koon differently, asserting that the decision therein was reached only because the trial judge had made the determination that a prima facie case existed. The Respondent's analysis of Koon ignores the fact that the prosecutor's initial objection did not assert any prima facie case. To whatever extent the prosecutor did demonstrate a prima facie case, by referring to a pattern of peremptory challenges, that demonstration was made after the Batson inquiry had begun and after defense counsel had already given the reason for the challenge. 34 F. 3d at 1441. Had the Third District herein given credence to the Respondent's interpretation of Koon, the Third District would have had to consider and evaluate the State's assertion that defense counsel had used all five peremptory challenges on white jurors. But, as noted above, the lower Court did not do that, as the Court viewed the prosecutor's objection as being limited solely to the prosecutor's initial, pre-inquiry identification of the juror's gender.

Not only does Koon highlight the difference in the approach taken by the Third District, an approach which the Respondent, through his own analysis of Koon implies is erroneous by refusing to consider a pattern of discrimination which is alleged during the course of an inquiry commenced pursuant to a deficient objection, but, contrary to the Respondent's further interpretation of Koon, that Court clearly concluded that the absence of a prima facie case is completely irrelevant once defense counsel gives the reason for the challenge. The Respondent has asserted that Koon stands for the proposition that a reason volunteered by defense counsel can be considered, after a

deficient request for an inquiry, only if the trial court, at some point makes the determination that a prima facie case exists. See, Brief of Respondent, pp. 19-20. However, the Court in Koon clearly stated that any error committed by the trial court in not requiring the prosecution to make out a prima facie case prior to the inquiry is "irrelevant" once defense counsel offers the reason for the challenge. 34 F. 3d at 1440. Thus, it does not matter, according to the Court in Koon, whether the trial court ever found that a prima facie case existed; nor does it matter whether the prosecution, at any subsequent time, did establish such a prima facie case. Notwithstanding the foregoing, in both Koon and the instant case, the prosecution, during the course of inquiries not predicated upon previously established prima facie cases, did establish the types of patterns of conduct which routinely suffice to establish prima facie proof of discrimination. Thus, even if the Respondent's own analysis were applied to the instant case, the State did establish a reasonable inference of discrimination; it merely uttered the pattern of discrimination a few minutes after the initial objection; a few minutes into the Neil inquiry; and a few minutes before that inquiry was concluded. To find that such pronouncements by the prosecution can not be considered because they come after an objection deemed technically insufficient by the lower Court, merely serves to highlight the hypertechnical manner in which the lower Court is reviewing these claims.

Just as this Court noted that the law as it existed prior to Johans was resulting in difficulties in the trial courts, it must now be concluded that the lower Court's

interpretation of Johans is similarly resulting in unjustifiable dilemmas. Convictions are now being reversed not due to improper findings by trial courts regarding the existence of nonexistence of discrimination in the use of peremptory challenges. Rather, convictions are being reversed due to perceptions that trial courts are conducting Neil inquiries absent a jurisdictional basis for those inquiries. Convictions are being reversed because allegations of patterns of discrimination are deemed irrelevant if uttered after an allegedly deficient objection has already triggered a Neil inquiry. The lower Court has made it clear that its mode of analysis refuses to look at anything that is said once an inquiry is commenced based upon what it deems to be an insufficient objection.

Such a turn of events warrants appropriate corrective action from this Court every bit as much as the pre-Johans wrongful refusals of trial judges to conduct Neil inquiries called out for corrective action in Johans. Several courses of action remain open to this Court. First, this Court can make it clear that an inquiry should be conducted absent any prima facie case, based solely on an objection and identification of the distinctive race or gender of the juror at issue. While this may result in some unnecessary inquiries, it will not result in reversals due to the failure to conduct inquiries. To the extent that attorneys are abusive, by making bad faith requests for inquiries, such abuses can be dealt with through the courts' supervisory powers. A decision to conduct an inquiry, even if wrongful, does not render a trial unfair. If reasons given pursuant to an inquiry demonstrate discriminatory intent, by virtue of

pretexts under Slappy or lack of factual support for the reasons, why should such discrimination be countenanced due to a deficient objection by the prosecution? Second, as did the Court in Koon, this Court can make it clear that any time an attorney gives a reason for the challenge, that reason can be considered and evaluated under Neil and Slappy and their progeny.

The third alternative available to this Court in the effort to strike a balance between the dual goals of a fair trial and a judiciary free from the taint of discrimination, is the application of harmless error analysis to an erroneous decision to disallow a peremptory challenge during a Neil inquiry. While the State has addressed this at length in its initial brief herein, the State would further note that the recent adoption of the 1996 Criminal Appeals Reform Act, Laws of Florida, Ch. 96-248, effective July 1, 1996, gives further cause for revisiting the question of whether harmless error analysis should be applicable, at least prospectively, with respect to appeals commencing subsequent to the effective date of the new law. Under the new law, section 924.051(8), Florida Statutes (1996), provides:

> In a direct appeal or a collateral proceeding, the party challenging the judgment or order of the trial court has the burden of demonstrating that a prejudicial error occurred in the trial court. A conviction or sentence may not be reversed absent an express finding that a prejudicial error occurred in the trial court.

This new statutory provision has effectively turned harmless error analysis on its head. Under prior law, the State had the burden of proving, beyond a reasonable doubt, that

there was no reasonable possibility that an error contributed to the verdict. State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986). The burden of demonstrating prejudice has now shifted to the appellant, and a conviction "may not be reversed absent an express finding that a prejudicial error occurred." "'Prejudicial error' means an error in the trial court that harmfully affected the judgment or sentence." Laws of Florida, Chapter 96-248, section 4; section 924.051(1)(a), Florida Statutes (1996). In view of the foregoing, it would be further appropriate to revisit the question of the applicability of harmless error analysis to erroneous denials of defense counsel's peremptory challenges. Reinstating a stricken juror on the panel, due to a denial of a peremptory challenge, does not result in an unfair trial when there can be no objective demonstration that the reinstated juror was biased or unfair. Such a reinstatement of a juror does not demonstrate prejudicial error "harmfully affect[ing] the judgment or sentence." Thus, although this Court has, in the past, held a wrongful denial of a peremptory challenge to constitute per se reversible error, not only does the context of the instant claim call out for reconsideration of the applicability of that principle, but, the recent adoption of the new legislation requires reconsideration of that principle as applied prospectively, to appeals commenced subsequent to July 1, 1996. Since any decision herein will govern future trials and appeals, consideration of the impact of the new legislation on harmless error review would therefore be appropriate. The reasons for applying harmless error analysis in cases such as the instant one are more fully developed in the State's initial brief herein.

CONCLUSION

Based on the foregoing, the petition for review should be granted and the lower Court's decision should be quashed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Reply Brief of Petitioner was mailed this 2nd day of August, 1996 to ROBERT KALTER, Assistant Public Defender, Office of the Public Defender, 1320 N.W. 14th Street, Miami, Florida 33125.

RICHARD L. POLIN